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Supreme Court of the United States

October Term, 1956

No. 304 MISC.

LEONARDO SALEMI,

Petitioner,

v.

WILFRED S. DENNO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the final order of the United States Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Southern District of New York denying petitioner's application for a writ of habeas corpus.

(a) The Opinions Below

The opinions of the District Court and of the Court of Appeals have not yet been reported. Copies thereof are hereto annexed as Appendix A (pp. 31-38, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on July 13, 1956 and is final.

2. Timely application for rehearing was made and denied on August 16, 1956.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1254(1).

(c) Questions Presented for Review

1. May a United States Court of Appeals, in a habeas corpus proceeding which challenges a state conviction, refuse to consider questions raised under the United States Constitution on the ground that the state courts had denied motions for a new trial on which these questions were raised on an adequate non-federal ground, where no other form of relief was available in the state court?

2. Did the court below err in ruling that petitioner's contention with regard to the witness Janson had been disposed of in the state courts on an adequate non-federal ground?

3. Did the court below err in ruling that petitioner's contention with regard to the witness James Forlenza had been disposed of in the state courts on an adequate non-federal ground?

4. Is it a denial of due process to permit a conviction of murder in the first degree to stand where the facts with regard to the mental health of the only witness who identified the defendant as the killer were known to the prosecution and not disclosed to the defense and when this witness was committed as insane immediately after the jury's verdict?

5. Is it a denial of due process to permit a conviction of murder in the first degree to stand where proof of a

dying declaration implicating the defendant was adduced before the jury and after its verdict credible evidence was produced to the effect that the witness who testified was not with the deceased when he claimed the declaration had been made and that the condition of the deceased was then such that no dying declaration could have been made by him?

6. Is it a denial of due process to deny all relief under the circumstances related in the two preceding questions?

(d) Statutes Involved

New York Code Crim. Pro., § 465:

> "§ 465. *In what cases granted.* The Court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases"
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> • • •
>
> "7. Where it is made to appear, by affidavit, that upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed."

(e) Statement of the Case

Petitioner has been convicted of murder in the first degree in New York. After exhausting his state remedies he instituted the instant habeas corpus proceeding in the United States District Court.

Petitioner was charged with the murder of one Walter Forlenza by shooting (fol. 8).* The shooting occurred in the early evening of February 26, 1952 in a restaurant while decedent was sitting at a table alone (fols. 194-201). Decedent died on the following day on the operating table (fol. 833). No motive for the killing was established. Petitioner was placed at the scene by two witnesses, but one of these, a part owner of the restaurant, Bertorelli, merely testified that petitioner had been there a few minutes before the shooting (fols. 186-189). The other, Janson, testified that petitioner stood over deceased with a gun in his hand (fols. 307-313). Janson claimed he had seen petitioner before, the last time about a year or so earlier (fol. 383). When first questioned by the police and the District Attorney he said that he recognized petitioner as a man he had seen at the bar, but not at the time of the shooting (fols. 545, 546). He had lied then, he said, because he had been afraid (fols. 627-632).

At the time Janson testified he was being held in prison as a material witness (fols. 325, 626). Two days before he had run into some bars, inflicting a scalp wound (fols. 326, 481-483). This was a suicide attempt (fol. 2018). The prosecution knew this before Janson testified (fols. 2266, 2267). That was not then disclosed to the defense (fols. 2874-2877). Although the actions of Janson were so strange (fols. 2240-2244) that the prosecutor had him

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* Folio references are to the printed record in the Court of Appeals on file in this Court in connection with No. 45 Misc., October 1954 Term.

kept under surveillance (fols. 2267-2272), no doctor examined him until after the verdict (fols. 2244, 2245, 2312, 2313). Then at the suggestion of the prosecutor's physician Janson was sent to Bellevue, pronounced "psychotic" and committed for treatment to a hospital for the insane. The hospital records were attached to the motion papers for a new trial made in 1953 (fols. 1936-2019 *). At the hearing held on that motion the defense sought to establish that Janson was insane when he testified (fols. 2022-4109). Judge Goldstein ruled that Janson was sane (fol. 4124) and denied the motion (fol. 4128). The hospital records (1986, 1987, 13a) show that when questioned at the hospital Janson expressed uncertainty about his identification and apparently did not even remember that he had testified.

At the trial the prosecution also offered the testimony of a brother of deceased, James, to the effect that between 5 and 5:30 P. M. on the day he died deceased had named petitioner as his assailant (fols. 679-684). No reference had been made to that testimony in the prosecutor's opening statement (see fols. 91-96) and it came as a complete surprise to the defense. James had never mentioned this, he said, until May (fol. 702).

Subsequent to the trial petitioner ascertained for the first time, by unimpeached testimony of disinterested persons, that the physical condition of decedent at that time was such that he could not have made the dying declaration so testified to and that no one was with him at the time indicated other than the hospital personnel.

At first petitioner sought redress with respect to both these matters by an application for writ *coram nobis*. That was dismissed by Judge Goldstein and the dismissal affirmed by the Court of Appeals but without prejudice to the presentation of the issue with respect to the dying declaration

* Relevant extracts are set forth in the Appendix used in the court below, pp. 9a-16a.

by motion for a new trial (308 N. Y. 863). Such a motion was promptly made, claiming that a conviction obtained under the circumstances disclosed constituted a denial of petitioner's right to due process under the Fourteenth Amendment to the United States Constitution.

At a hearing on this motion before Judge Goldstein various persons gave their versions of what occurred at the hospital in the hours preceding the removal of Walter to the operating room. To understand the testimony then elicited it must be borne in mind that at the trial the prosecution sought to prove that Walter had told his brother James between 5 and 5:30 P. M. (fol. 691)—that is, just before he was removed for the operation—that appellant had shot him. The defense [misled by the hospital records that indicated that Walter was then able to talk (see S. M. 101, 107)] originally sought to show that Walter, when asked by his mistress, Evelyn, had said he did not know who had done it (fols. 1358, 1359). Then, in rebuttal, the prosecution put James' wife, Maud, on the stand. She testified that, before Walter had died, Evelyn had told her that Walter had accused appellant (fols. 1393-1395). Evelyn had denied this (fols. 1364-1365).

Now, at the motion hearing, petitioner sought to establish two things—that James was not at the hospital when he said he was there; that Walter was in no physical condition to have made any declaration.

Petitioner established the first of these positions by the testimony of wholly disinterested, unimpeachable witnesses. The special nurse, Mrs. Cancro, hired to look after Walter, testified that no man had come to see him after she returned from lunch around 1:30 (S. M. pp. 132, 154),* although there were two men there at that time (fol. 127). The policeman, Snyder, assigned to guard Walter and who came on duty

* These references are to the typewritten minutes of the hearing held in 1955.

at 4 P. M. (S. M. pp. 463, 465), Dr. Strully (S. M. p. 200) and Patsy Yannotti (S. M. pp. 83-85) all eliminated James as having been there. Even Evelyn, who at the hearing testified for the state and repudiated her trial testimony, said that James had not been at the hospital in the afternoon (S. M. pp. 663, 714, 750). Only James' sister Jeanne and his wife Maud (S. M. pp. 374, 421, 512-514) corroborated him. And their testimony fixes the time at 5 to 5:30 P. M. so that it could not have been James who was one of the two men seen by Mrs. Cancro when she returned from lunch.*

The testimony on the other phase of the case came from the same nurse and the two physicians in attendance, Drs. Strully and Breidenbach. They described their patient's condition in detail and expressed the opinion that he was not physically able to talk, that he was able only to express himself by grunts and motions of the head (S. M. pp. 183-197, 285, 288, 294, 295). Dr. Strully himself had asked Walter whether he knew who had shot him and he had indicated, by the motion of his head, that he did not know (S. M. pp. 194, 258). Each expressly stated that the conversation testified to by James could not have taken place (S. M. pp. 201-204, 297, 298, 300).

Excerpts from their testimony are in the Appendix used in the court below (pp. 16a-21a).

The prosecution sought to counter their testimony by that of Evelyn, James' wife Maud, his sisters and one Tony Donato, also known by the picturesque names of Iodine or Big Poison. The sister and Maud simply testified that Walter had been able to talk at various times of the day (S. M. pp. 370, 371, 427, 428, 501-508). Evelyn and Tony each claimed that Walter had accused petitioner to them.

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* Besides, no one ever claimed that James was accompanied on his visit by another man.

Evelyn's story was that Walter had accused petitioner early in the day with the injunction that she should not reveal it unless he died and then only to James (S. M. pp. 552-554). She said she had obeyed this injunction. (This contradicted Maud's testimony at the trial (fols. 1393-1395).) But she admitted that when asked by the District Attorney, the police and later by a relative and girl friend of petitioner, she said that Walter had been unable to identify his assailant (S. M. pp. 563-565). Those statements, as well as her trial testimony, she now claimed were false and had been motivated by fear (S. M. pp. 561-562)—although she conceded that no one had threatened her (S. M. pp. 605, 608). The new version first was developed several years later in a conversation with the Assistant District Attorney who had tried the case in the course of an interview prompted by the seizure of some quinine in Evelyn's apartment and her being questioned about an unidentified homicide case (S. M. pp. 567-574, 586-589). In the meantime she had become Donato's mistress (S. M. pp. 575-578).

Donato himself had a long criminal record, was serving a prison sentence for possession of drugs at the time of the hearing and was awaiting sentence on another offense (S. M. pp. 723-725). He claimed that he had visited Walter around 10:30 A. M. with another man (S. M. pp. 732, 733) when the statement was made. Why Walter should have confided in Donato was never made clear. And Walter's widow, Mary, testified that Donato had told her Walter could not talk (S. M. p. 1106).

Donato also testified that in the Tombs petitioner had admitted the crime and given a motive for it (S. M. pp. 736-738). But the story so told is at variance with the testimony of all the other witnesses as to the circumstances surrounding the shooting (cf. fols. 187, 195-197, 300-307). Moreover, it is inherently incredible that petitioner, at the very time he was trying to get a new trial, should have admitted the crime.

Judge Goldstein held (see Appendix pp. 19-25, *infra*) that the evidence produced on the motion with regard to James' presence at the hospital was merely cumulative. He rejected the testimony of the physicians adduced by petitioner because he believed that their opinions were based on statements contained in the hospital records and not borne out by an examination of Walter's body he directed to be made.

After Judge Goldstein denied the motion for a new trial defense counsel were informed by the Catholic Chaplain of Sing Sing that another inmate, one Clark, formerly Colbert, had made a statement accusing Donato of perjury (Cl. S. M. pp. 1-4).* The hearing was then reopened and Clark called (Cl. S. M. p. 7). He testified that when he had met Donato at Sing Sing Donato had talked about petitioner's case, claimed that petitioner was innocent, that the story about a dying declaration was false and that he, Donato, would help petitioner to get a new trial. Clark, having seen an account in a newspaper of the testimony Donato had actually given, was astonished and went to the Chaplain with his story (Cl. S. M. pp. 22-26). Donato denied that he had ever talked with Clark about the case at all (Cl. S. M. p. 77). Clark had said that part of this talk had been in the presence of another prisoner, Jennings (Cl. S. M. p. 23), but the latter was not called. The defense put Donato's mother, Maria, on the stand. She testified that her son had told her before Walter died that he had not been able to talk (Cl. S. M. pp. 115-125). Thereupon Judge Goldstein adhered to his position, without further opinion (Cl. S. M. p. 143).

Direct review of the denial of the motion by the New York Court of Appeals was accomplished by the device of an application to that court for reargument of its original decision affirming the conviction. Such reargument was granted, with the result that the Court of Appeals

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* The pagination of this hearing starts anew.

was able to test the new matter "as if it had originally been a part of the main record" (309 N. Y. at 210). Judge Dye, for the majority, reviewed petitioner's contentions on the merits, rejected them and concluded that petitioner had been "accorded due process." Judge Dye disposed of the first issue by stating that on the original appeal the Court had unanimously agreed with Judge Goldstein's finding that Janson was competent to testify. As to the second, he concluded that the evidence produced at the hearing with respect to the dying declaration was not "newly discovered" because the names of the witnesses appeared on the hospital records.* He stated also that the claim that decedent could not talk was inconsistent with the position taken by the defense at the trial. Judges Fuld, Desmond and Van Voorhis dissented, all concurring in two separate opinions.

Judge Fuld expressed the view that a refusal to direct a new trial would not only be unjust to petitioner but "would do a disservice to the administration of the criminal law." His conclusion is all the more noteworthy since he was part of the original majority.† He said that the proof not before the jury demonstrated that Janson had been insane when he originally testified and that this proof also created a real doubt as to the dying declaration.

After this Court denied certiorari, 350 U. S. 950, the instant habeas corpus proceeding was instituted. The District Court had before it the printed record of the trial and the first motion for new trial (which was also before this Court after it denied certiorari in No. 45 Misc., October 1954 Term, 348 U. S. 845) and the stenographer's minutes of the second motion. Both of these were before the Court of Appeals and have been certified to this Court.

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* The statement is misleading since the name of the nurse, Dorothy Cancro, did not appear on the only record which was in court—neither her married nor her maiden name (S.M. pp. 175, 339, 340).

† One of the original dissenters, then Chief Judge Lewis, retired before the reargument.

The application came on before Judge Clancy who, without holding a hearing, dismissed the application.

The Court of Appeals affirmed in an opinion by Judge Waterman without discussing the constitutional claims raised on the ground that the state court had affirmed "on an adequate state ground." An application for rehearing was denied, with a modification of the opinion.

(f) How the Federal Issue Was Raised

The federal question sought to be reviewed was raised in the state court in the application for the writ *coram nobis* and again in the 1955 motion for a new trial and was urged in the New York Court of Appeals in the following ways:

In the *coram nobis* application in the petition dated December 6, 1954, in paragraph Seventh thereof in which it was expressly stated that it would be a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution to permit this conviction to stand.

The same contention was expressly made in the 1955 motion for a new trial.

In the notice of appeal to the New York Court of Appeals from the dismissal of the *coram nobis* petition it was expressly stated that such denial constituted a denial of due process under the Fourteenth Amendment. A like statement was contained in the application for reargument which served to bring to the New York Court of Appeals a review of the denial of the motion for a new trial.

In the District Court the issues were raised in the petition for the writ in paragraphs 8, 9, 10 and 14 (the petition is contained in the Appendix used in the court below, pp. 2a-5a).

(g) The Reasons Relied on for the Issuance of the Writ

1. The court below has so misconceived its function in passing on the dismissal of an application for a writ of habeas corpus as to call for the intervention of this Court.

The court below expressly refused to rule on the constitutional issues here raised on the ground that the denial of the motions for a new trial by the state courts "in each instance was based on an adequate state ground" (see opinion on rehearing, *infra*, p. 38).

We believe that this question has never been decided by this Court. Its importance cannot be doubted. For if the court below is right then a federally guaranteed right can be denied without redress and a man sent to his death if the state court can find a procedural basis for its decision which this Court does not reject as lacking in substance. We do not believe that this is or should be the law.

We are, of course, mindful of the fact that this Court will not review a state judgment for alleged infringement of federal right if the judgment rests on an adequate state ground. That rule is ancient and well settled. *Ellis* v. *Dixon*, 349 U. S. 458. But we do not believe that this rule should be extended to federal habeas corpus proceedings.

Indeed, that has been impliedly recognized by this Court. For in holding that there are exceptional cases in which it is unnecessary to apply for certiorari to review the state court's affirmance of a conviction, reference was made to the case in which that affirmance rested on a state ground so that direct review would not be possible.

In *White* v. *Ragen*, 324 U. S. 760, this Court said at page 765:

> "• • • But where the decision of the state court is that the remedy of habeas corpus is not available under the state practice, or its decision is based

upon some other adequate non-federal ground, it is unnecessary for the petitioner to ask this Court for certiorari in order to exhaust his state remedies, since we would lack jurisdiction to review the decision of the state court; and the denial of certiorari by this Court would not preclude a district court from inquiring into the federal question presented to, but not considered by, the state court. See House v. Mayo, 324 U. S. 42, 48.* * *"

To like effect is *Wade* v. *Mayo,* 334 U. S. 672, at 682:

"In the instant case, we believe that it was well within the discretion of the District Court to consider Wade's petition for a writ of *habeas corpus.* The Florida courts had given a full and conclusive answer to his claim that he had been denied his constitutional right to counsel. No other remedies were available in Florida. True, he did not seek certiorari following the dismissal of his *habeas corpus* appeal by the Supreme Court of Florida. But at the time of that dismissal, it was extremely doubtful, to say the least, whether the constitutional issue had really been decided. That doubt was such as to make it reasonably certain that this Court would have denied certiorari on the theory that an adequate state ground appeared to underlie the judgment. His failure to make this futile attempt to secure certiorari accordingly should not prejudice his subsequent petition for *habeas corpus* in the District Court. Otherwise he would be left completely remediless, having been unable to secure relief from the Florida courts and being barred from invoking the aid of the federal courts."

While other things said in the opinion in this last cited case were disapproved by this Court in *Darr* v. *Burford,* 339 U. S. 200 (at 209, 210), the quotations here reproduced both from *Wade* and from *White* were, in part at least, quoted there with approval. And *Ex parte Hawk,* 321 U. S. 114, was cited as stating the correct rule. There this Court said at page 118:

"* * * But where resort to state court remedies has failed to afford a full and fair adjudication of

> the federal contentions raised, either because the state affords no remedy, see *Mooney* v. *Holohan, supra,* 115, or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore* v. *Dempsey,* 261 U. S. 86; *Ex parte Davis,* 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless. * * *"

In the light of these decisions we turn to the more recent statement in *Brown* v. *Allen,* 344 U. S. 443, at 458, that "where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed". For this rule the court cited *Mooney* v. *Holohan,* 294 U. S. 103, and *Ex parte Hawk, supra.* But it is significant that in the *Hawk* case (in the portion quoted above) this Court said that habeas corpus was available not only when no remedy ever existed (for which *Mooney* was there cited), but also when the remedy afforded proved "seriously inadequate".

We submit that the categorical statement in *Brown* v. *Allen* does not represent the considered judgment of this Court, that it has never prevailed in practice and should not be allowed to control here. It is not every "adequate state ground" which should foreclose review by a federal court of a substantial federal question actually raised in the state court.

That not every failure to follow the rules laid down by state courts bars review in the federal courts was held recently in *Massey* v. *Moore,* 348 U. S. 105. There the state had ruled that the tendered issue could be raised only by appeal and not, as attempted, by habeas corpus. Yet this Court ruled that the District Court must hold a hearing to determine the facts.

We submit that the question to be considered by the federal courts is not whether the state court rested its

decision on a non-federal ground, but whether, considering all the circumstances, there has been a denial of constitutional right. Of course, a claim of such denial can be disregarded if it was not appropriately made in the state court, but where, as here, it was made it cannot be ignored because the state court has determined that the procedure by which it was raised was imperfect, unless indeed some other procedure for raising the issue was available.

Thus where the appropriate state remedy is by *coram nobis* there is, of course, no basis for federal intervention when an attempt was made to raise the issue in the state court by habeas corpus, or vice versa. But here it is settled that neither of these remedies is available: as to habeas corpus see *Matter of Hogan* v. *New York Supreme Court*, 295 N. Y. 92; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19; as to *coram nobis*, see *Matter of Salemi*, 308 N. Y. 863.

But where, as here, the only remedy left open by the state's highest court, that of a motion for a new trial, is by statute and judicial interpretation so circumscribed as to prevent petitioner from securing redress, then no formula such as "adequate non-federal ground" can be allowed to stand in the way of a vindication of a constitutional right and the accomplishment of substantial justice. Perhaps this is only another way of saying that the decision of the state court was not on an "adequate" non-federal ground and to this we shall now address ourselves.

2. The decision of the court below has decided an important question involving the relation between state and federal courts in a manner inconsistent with the decisions of this Court. For its ruling that the state courts decided the issues on an "adequate state ground" ignores the purpose of the rule of comity which we have just discussed and is, moreover, based on a misconception of the record.

It is settled that this Court will determine for itself whether the alleged non-federal ground was "adequate": see *Davis* v. *Wechsler*, 263 U. S. 22; *Lawrence* v. *State Tax*

Commission, 286 U. S. 276; *Brown* v. *Western R. of Alabama*, 338 U. S. 294.

The court below in its opinion said: "Protracted state court hearings determined that petitioner was not entitled to a new trial under that statute [N. Y. C. Cr. Proc., § 465, subd. 7] because he was aware or should have been aware of the alleged 'newly discovered' evidence at the time of trial by the exercise of due diligence" (*infra*, p. 36). With all deference we submit that this statement is incorrect with reference to both of petitioner's claims.

a. In the first place the state in its brief below did not claim that the motion for a new trial with respect to Janson should have been denied for lack of diligence or that it was in fact denied on that ground. It is undisputed that until the trial was over the defense was not informed that Janson had said he tried to commit suicide, although this was known to the prosecution (fols. 2266, 2267, 2874-2877). As Judge Desmond said (309 N. Y. at 228): "It is unreasonable to charge defense counsel with lack of diligence in discovering the facts as to Janson, facts which were diligently kept from him by those whose duty it was to disclose all pertinent information about a witness, especially in a first degree murder case." Moreover, the fact that Janson was committed as insane could not have been brought before the jury since the commitment did not occur until after the trial—indeed the prosecutor refrained from having Janson examined by a physician until after the verdict (fols. 1818-1842).

In the state courts this aspect of the case was disposed of solely on the ground that, months after the trial, Janson was found to be sane. Judge Goldstein so ruled (fol. 4124). The state Court of Appeals affirmed without opinion (306 N. Y. 863). But in the later opinion (309 N. Y. 208) Judge Dye stated (p. 213) that the court had "unanimously agreed that Judge Goldstein was right when he ruled that 'on both occasions he (Janson) was competent to testify' ". There

was no intimation in Judge Dye's opinion that the motion was properly denied for any lack of diligence whatever.

The New York court's discussion of diligence related only to the issue of the dying declaration. And, in its brief in the court below, the state also in discussing diligence, dealt only with that incident (Brief, pp. 26-29).

Therefore the ruling of the court below that the state court rested its decision on an adequate state ground cannot be supported on the basis assigned. The only ruling the state court made was that since Janson was found to be competent to testify nothing else mattered. But surely, in a capital case, that is not enough. See *Taborsky* v. *State*, 142 Conn. 619. If a witness has tried to commit suicide and then been adjudicated as insane, how can it be said that due process has been observed when the jury did not know these facts? That is an issue of constitutional law that was not decided by the state court or by the courts below. It must be decided before this petitioner can be allowed to go to his death.

Surely no issue of due diligence arose, as the court below seems to have suggested (*infra*, p. 38)—although the state courts never did—merely because Janson was questioned at the trial about the cause of his injuries.* It was one thing to suppose, as defense counsel might well have done, that he tried to avoid giving testimony by injuring himself; quite another situation would have presented itself to the defense had it known, as the prosecution did know, that this was actually a suicide attempt. Moreover, the subsequent adjudication as insane casts its shadow behind in an ineradicable fashion.

And it is no answer to suggest, as did the District Court (*infra*, p. 32), that the suicide attempt was "before the jury to the extent of the prosecutor's right to present it".

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* It should be noted also that the questioning with regard to "prior mental stability" was almost entirely by the court (see fols. 482-4, 10a, 11a).

No one has suggested that the prosecutor should have informed the jury of the attempted suicide, but only that he should have advised the defense. Whether the defense would then bring out the fact, risking development of reasons that might, by some, be considered unfavorable, was for the defense to decide—not for the prosecution.

Other statements in that opinion are not borne out by the record. Judge Clancy said (*infra*, p. 32) that there was nothing in the record which supported the defense charge that there had been any suppression or concealment of evidence by the prosecution. This is at variance with the statement by Judge Desmond, concurred in by Judges Fuld and Van Voorhis, that the facts as to Janson "were diligently kept from him [i.e., defense counsel] by those whose duty it was to disclose all pertinent information about a witness" (309 N. Y. at 228).

The statement that the District Attorney did not learn that Janson had stopped eating until the evening of November 20th and that he at once arranged for an interview with the police physician is not based on a fair reading of the record. Detective Mengrone said he had told the prosecutor that Janson had stopped eating either the 18th or 19th (fol. 2241). And even Detective Whelan said Janson had stopped eating on Tuesday (fol. 2310)—[that was the 18th].

Moreover, as we cannot help repeating, the issue here is not whether in fact Janson was sane when he testified, but whether a conviction can be sustained when the only witness who identifies defendant as the murderer was, when he testified, in so unbalanced a condition that he had tried to commit suicide before he testified, acted strangely afterward, and was then committed as insane.

b. With reference to the dying declaration, it is true that the state courts ruled that due diligence had not been shown. In the court below that finding was supported

primarily by the statement (as amended on rehearing) that "hospital records then [i.e., at the trial] available to defense counsel, in his possession, and introduced by him at the trial, gave information leading to the identification of all of the persons in attendance at and before the time of the victim's death" (*infra*, p. 38). That was a modification of a statement in the original opinion that the records "gave the names of all of the persons, etc." (*infra*, p. 37).

Neither statement is accurate. Yannotti was not mentioned in these records. The state has not claimed otherwise (see Brief below, p. 27). Moreover, the crucial witness was Mrs. Cancro (formerly Miss Cleghorn). Mr. Fruchtman testified that there was nothing in the records in his possession which gave him any clue to her identity (S. M. p. 175). The Director of Nurses, Miss Karasak (S. M. p. 324), testified also that her name had not appeared on the records which were produced in court (S. M. pp. 339, 340). To find her name—and then only her maiden name—that witness had to consult other records in her own office (S. M. p. 340). The identity of this witness was even then not established until counsel had conferred with the registry through whom she had been hired (S. M. pp. 340-360). And her married name as first obtained was actually misspelled (S. M. p. 175).

It is asking the impossible to suppose that a lawyer engaged in the trial of a case could conduct the investigation necessary to obtain this information in time. We are not here dealing with a public office staffed with investigators, or even with a large law office, but with a single practitioner defending an ordinary client. To permit the client to be executed because his lawyer had no facilities for making an investigation near the end of a trial when there is nothing even to show that the witness could have been traced in time shocks the conscience.

Even with respect to the doctors, whose names were on the records available, is it reasonable to charge counsel

with lack of diligence when those records indicated that Walter Forlenza had in fact been able to talk (see S. M. pp. 101, 107)? Only when Mrs. Cancro explained the language she had used did the importance of those doctors become apparent.

While it is true, as the court below said (*infra*, p. 37), that there was "considerable dispute at the trial concerning the time at which the alleged dying declaration was made", this dispute did not focus on the vital point developed later, namely, that James Forlenza was not at the hospital when he said he had been. At the trial the defense did no more than call attention to statements which James had given on other occasions which gave varying times for his presence (fols. 787, 826-828). The defense was not able to show that he had not been there at the critical time fixed by his trial testimony. And if a jury were to accept the later testimony of the numerous disinterested witnesses (Dr. Strully, Mrs. Cancro, Patrolman Snyder and Patsy Yannotti) against that of James and his wife and sister, conviction could not possibly result.

c. We have, perforce, discussed the two issues separately. But each affects the other. As in so many other situations the case must be considered as a whole. And so considered the conclusion is inescapable that the basic issues of due process have not been met but sedulously avoided. When the state court ruled (308 N. Y. 863) that the classic remedy for an unjust conviction, *coram nobis*, was here not available and that petitioner must proceed by way of the more narrowly based motion for new trial on the ground of newly discovered evidence, and then threw out that application on the alleged ground of laches, that very act denied petitioner his constitutional rights. There is in this case no adequate state ground.

3. The issues of due process are substantial.

In the state Court of Appeals Judge Fuld, in an opinion concurred in by Judges Desmond and Van Voorhis, said

that because of the new matter which had now been developed, he could not vote for affirmance "consistent with the dictates of conscience or the *demands of due process*" (emphasis ours), and that a refusal to grant a new trial "will do a disservice to the administration of the criminal law" (309 N. Y. at 227).

Judge Fuld said, with respect to the two grounds of petitioner's claims:

> "The conviction against the defendant depended primarily upon the testimony of two witnesses, Paul Janson, who identified defendant as the killer, and James Forlenza, the deceased's brother, who testified that the victim had made a dying declaration to him, naming defendant as his assailant.
>
> "As to Janson, proof not before the jury demonstrates that he was probably insane at the time he testified against the defendant, and, as to Forlenza, the newly discovered evidence creates a real doubt as to whether he ever received a dying declaration from his brother. No more need be said about the evidence relating to Janson, for it is indisputable that he was committed as an insane person on the very day after the jury returned its verdict of guilt against defendant. And very little more need be said about the testimony bearing upon the authenticity and existence of the alleged dying declaration. It is enough to observe that, had the new matter been before the jurors at the trial, they would have heard—from witnesses of the highest character, whose honesty and sincerity are beyond all suspicion—not only that Forlenza was not at his brother's bedside in the hospital during the period he said he spoke to the latter and received the declaration, but that, in point of fact, the victim was in no condition, physically or mentally, to have uttered any statement. There was, it is true, conflicting testimony, but the vital thing is that the jury never heard the evidence which, if credited, would have gone far toward destroying the prosecution's case" (id. at 227).

And in a separate opinion concurred in by Judges Fuld and Van Voorhis, Judge Desmond rejected the view of the majority that the court was "so tightly bound" by New York's rule with respect to "newly discovered" evidence (Code Crim. Proc., § 465, subd. 7) that it must close its eyes to the real facts. As to Janson he said:

> "I still think that a new jury should decide whether or not it is safe to accept the testimony of a witness who went straight from the courtroom to a mental institution, and the seriousness of whose mental illness was certainly not disclosed during the trial to defense counsel. It is unreasonable to charge defense counsel with lack of diligence in discovering the facts as to Janson, *facts which were diligently kept from him* by those whose duty it was to disclose all pertinent information about a witness, especially in a first degree murder case. It cannot be stressed too much that Janson was the only witness who identified defendant as the killer" (309 N. Y. at 228). (Emphasis ours.)

As to the dying declaration, he stated:

> "* * * That testimony obviously came as a complete surprise to defense counsel at the trial. To say now that the latter should have stopped the trial and made a prompt and thorough investigation, as to the probability or possibility of that declaration ever having been made at all, is to demand the impossible. Even if a long delay in the trial, for such an investigation, could have been had, how could any lawyer in such a situation have guessed at the existence of testimony which it has since taken months or years to uncover? How could defense counsel have imagined that elaborate investigations later made would turn up two physicians, two nurses, two police officers and several other persons, each prepared to give testimony of greater or less definiteness, completeness and weight, to the effect that the dying declaration could not have been made by decedent or heard by Forlenza?" (id. at 229).

In a remarkably similar case, *Taborsky* v. *State, supra,* the Supreme Court of Errors of Connecticut recently reached a result more consonant with due process than that reached by the New York court. There, as here, the only witness who identified the defendant became insane after he testified—although in that case the period of time was longer. There, as here, there had been some doubt about the witness' demeanor at the trial. There, as here, there was conflicting medical testimony on the issue whether or not the witness was insane at the time he testified. There, as here, there was considerable delay in bringing on the motion.

Nevertheless, the Connecticut court unanimously held that there should be a new trial. It pointed out that "in a case where human life is at stake, justice as well as humanity requires us to pause and consider before we apply those rules [that is to say, the rules relating to a new trial] in all their vigor".

The court, moreover, pointed out that it was not the function of the judge passing on a motion for a new trial to resolve the conflicting evidence as to the mental competency of the witness and to determine that as a fact. The court said that the only question was the effect which this testimony would have both on the trial court in ruling as to the witness' competency to testify and, if the testimony were allowed, the effect of the new evidence on the jury. The court concluded that such testimony would have a very persuasive effect on a jury.

While the court recognized that there had not been due diligence in all respects, it noted that the basic fact, namely, the subsequent insanity of the witness, was not known at the time of the trial. These considerations exist here also.

We submit that under conceptions of the due process clause laid down by this Court the conviction here obtained likewise cannot stand.

In defining due process this Court has never felt bound by any rigid definition.

As Justice Cardozo said in *Palko* v. *Connecticut*, 302 U. S. 319, 325, due process embodies concepts that are "of the very essence of a scheme of ordered liberty".

In *Betts* v. *Brady*, 316 U. S. 455, 462, Justice Roberts pointed out that "Asserted denial is to be tested by an appraisal of the totality of facts in a given case".

More recently, in *Malinski* v. *New York*, 324 U. S. 416, Justice Frankfurter said that this Court was under the obligation to determine from "the whole course of the proceedings * * * whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples".

These views were unanimously applied by this Court in *Rochin* v. *California*, 342 U. S. 165, to reverse a conviction because of the manner in which it had been obtained.

Furthermore, this Court has recognized that special considerations are applicable to capital cases: *Powell* v. *Alabama*, 287 U. S. 45; *Patterson* v. *Alabama*, 294 U. S. 600; *Williams* v. *Georgia*, 349 U. S. 375. As Justice Frankfurter said in this most recent decision: "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant."

In the case at bar there are several factors which, we respectfully submit, compel consideration by this Court. Petitioner was convicted on the basis of the testimony of two witnesses, Janson and James Forlenza. Yet there is the gravest doubt whether the testimony of either of them would be accepted by a jury with knowledge of all the facts now in the record.

a. The jury was not informed at the trial that Janson, the only witness who identified petitioner as the killer, had

attempted to commit suicide while held in jail as a material witness nor that after he testified he was held incommunicado and that his actions and speech at the time were such that the District Attorney had him examined by his own medical consultant. Obviously the jury never knew that the day after it brought in its verdict Janson was sent to Bellevue and then certified as insane. Statements made by Janson as recorded by the hospital indicated great uncertainty about his trial testimony (fols. 1986, 1987, 13a).

We submit that it is no answer to say, as did the state Court of Appeals, that it accepts Judge Goldstein's finding that Janson was sane when he testified. That is not the issue. For regardless of Janson's technical competency to testify, it is inconceivable that the requirements of due process have been met when a man is sent to his death without consideration by a jury of the weight to be given to the testimony of a witness so situated.

Moreover here, as Judge Desmond pointed out, facts were concealed from the defense by the prosecution. That itself constitutes denial of due process. Cf. *Mooney* v. *Holohan,* 294 U. S. 103; *Pyle* v. *Kansas,* 317 U. S. 213.

b. The jury at the trial no doubt accepted the testimony of James Forlenza that his brother had told him he had been shot by petitioner. Now it appears from unimpeachable witnesses that this is not so—or at least a jury could readily so conclude.

At the trial the issue of James Forlenza's presence at the bedside around 5 P. M. rested on his own testimony, supported by his wife. No one contradicted that. For Detective Mangrone who said he had not seen James there (fol. 917) had left before 5 P. M. (fol. 915). And Evelyn could not say that James wasn't there (fols. 1366-1368).

At the motion hearing testimony was given by five witnesses (two of them produced by the prosecution) in no way connected with the defense, that James had not been there.*

* In addition, Donato said James wasn't there.

Each of those witnesses was present until Walter was removed to the operating room. At least two of them were unknown to the defense at the trial.

It was, therefore, incorrect for Judge Goldstein to say that the issue as to whether James was at the hospital had been "fully explored at the trial." It was likewise incorrect to treat this issue, as did Judge Dye, as one relating to the "time" when the declaration was made.

The fact is that at the trial attention was called to discrepancies in James' own previous statements as to time, but the defense was in no position to show that James had actually not been at the hospital at all just before Walter we removed to the operating room. Since both James and his wife so fixed the time of his presence, the new evidence contradicting their stories was *new*, not cumulative. And it was of vital importance. For if James lied about having been there then it is of no consequence whether or not Walter had been able to talk.

Surely it would be a denial of due process to permit a man to go to his death when the chief testimony against him rests on such shaky foundations and no jury has passed on its credibility after hearing all the witnesses now available.

c. It is true, as both Judge Goldstein and Judge Dye pointed out, that at the trial the defense had not raised the issue that Walter could not talk. It must be remembered that the defense was not prepared for that issue, that no mention had been made by the District Attorney in his opening of any dying declaration (see fols. 91-96). As Judge Desmond pointed out, it is asking too much of a defense to be able to prepare itself in the middle of a trial * on such an issue. It is not strange, therefore, that the defense should have done the best it could and tried to show by

* James' testimony was given on the afternoon of the third day (fols. 33, 572, 683).

Walter's mistress, Evelyn, that he had said he didn't know who shot him. Moreover, her testimony by no means established that Walter had talked around 5 P. M. She indeed started to say that he couldn't talk then (see fol. 1358). And no time was fixed for the occasions when she said he had talked to her (fol. 1359)—and she wasn't cross-examined on the point. So actually there is no inconsistency in the positions taken by the defense—Walter might have been able to talk earlier, but not by 5 P. M.

Finally, defense counsel were no doubt misled by the way in which the hospital records were worded. On their face they indicated that Walter was able to talk (see S. M. pp. 101, 107). It was not until Mrs. Cancro was found that it appeared that these entries were not to be taken literally (see S. M. pp. 102, 107, 137, 149). Surely it was not strange that defense counsel took these records at face value during the trial.

There was a conflict in the medical testimony upon the motion hearing as to Walter's ability to talk. The prosecution's physicians, who had not seen Walter in his lifetime (S. M. pp. 902, 1061), expressed affirmative opinions of ability to talk (S. M. pp. 922, 1006) predicated upon autopsy findings. Petitioner's medical evidence of inability to talk came from a nurse and two disinterested physicians who had observed, examined and treated Walter prior to his death (S. M. pp. 96, 183, 283). In any event, the conflict between the opinion evidence on the one hand and that based upon personal observation and knowledge was not the function of the trial court to resolve. Concededly, petitioner's witnesses were of high standing and character with honorable and unimpeachable backgrounds who had no motive or interest to favor him. He is entitled to a jury's judgment upon the credibility of these witnesses and the resolution of this vital issue which involves his life.

In the court below respondent argued that no federal issue arises from the use of perjured testimony because there is no claim that the prosecution knew that it was perjured. This precise question has, we submit, not yet been determined by this Court. The cases then cited, such as *Mooney* v. *Holohan*, 294 U. S. 103; *White* v. *Ragen*, 324 U. S. 760, 764, merely contain language looking in that direction. For a contrary view, see *Jones* v. *Kentucky*, 97 F. 2d 335.

Moreover, we do not conceive that the limitation indicated in the cases relied on by respondent has any application here. Those cases decided only that the use of testimony known by the prosecution to be perjured is, like the use of an improperly obtained confession (*Leyra* v. *Denno*, 347 U. S. 556), such a denial of due process that a conviction may not stand despite the existence of other evidence pointing to guilt.* It may well be that the use or perjured testimony when unknown to be such to the prosecution does not necessitate reversal where there is other substantial evidence of guilt. But where, as here, no evidence of guilt remains if the challenged evidence is eliminated, then surely the refusal of a new trial is a denial of due process. At the least the issue is substantial and has not been determined by this Court.

Besides, the prosecution is, in this respect, in something of a dilemma. It has urged that the defense was not diligent in obtaining the testimony of the hospital physicians, because their names were on the records. That assumes that, at the time of the trial, it was incumbent on the defense to have inquired of these doctors. But, of course, it was equally incumbent on the prosecution to have

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* As to confessions see *Malinski* v. *New York*, supra at 404; as to perjured testimony see Mr. Justice Douglas dissenting (with concurrence of Mr. Justice Black) in *Stein* v. *New York*, 346 U. S. 156 at 205.

done so—indeed, much more so, since it was the prosecution that brought forward the dying declaration testimony. And if the prosecution did what it now says the defense should have done, then it had knowledge that the doctors would have contradicted James and it suppressed evidence favorable to the defense. That, of course, would be denial of due process.

• • •

Whether each of these matters considered separately would compel a conclusion of denial of due process need not here be decided. For, as Judge Fuld pointed out, it is their cumulative effect which is controlling. Without the testimony of Janson and James Forlenza no case whatever was made out against appellant. And conviction without proof would be, like a conviction on a charge not made, "sheer denial of due process". (Cf. *de Jonge* v. *Oregon*, 299 U. S. 353, 362.)

4. By so construing the statute relating to new trials (Code Cr. Proc., § 465, subd. 7) as not applicable to this case the state courts have denied petitioner all redress and so deprived him of due process of law.

Clearly due process is denied unless the state affords some corrective process: *Mooney* v. *Holohan*, 294 U. S. 103, *Ex parte Hawk*, 321 U. S. 114; Cf. *Frisbie* v. *Collins*, 342 U. S. 519; *Brown* v. *Allen*, 344 U. S. 443, 458.

Conclusion

May we remind this Court again of the strong language used by the dissenting judges in the Court of Appeals. Judge Fuld said that the result was "a disservice to the administration of the criminal law" (309 N. Y. at 227). Judge Desmond said that a defendant's fundamental right to trial by jury would be denied "until a jury has heard this strange new series of conflicting and confusing narra-

tives, many of them highly favorable to the defendant" (*id.* at 228).

We respectfully submit that this Court should grant certiorari and dispose of the constitutional issues raised.

Respectfully submitted,

Osmond K. Fraenkel,
Counsel for Petitioner.

APPENDIX

Opinion of Clancy, *U. S. D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 106-300

UNITED STATES ex rel. LEONARDO SALEMI,

Petitioner,

against

WILFRED L. DENNO, Warden of Sing Sing Prison.

(Opinion)

OSMOND K. FRAENKEL, Esq., Attorney for Petitioner, 120 Broadway, New York, N. Y.

FRANK S. HOGAN, Esq., District Attorney, New York County, Attorney for Respondent, New York, N. Y.

CLANCY, *D. J.*:

This application for a writ is denied. It is based on alleged denial of due process in a refusal of a new jury trial of the case that would involve a hearing of the issues of the decedent's inability to talk after he was shot and a claim that a witness, Janson, was insane when he testified.

The proof of the ability of the deceased to talk between the shooting and his death is clearly not newly discovered evidence. The defense, at the trial, presented a witness who testified that deceased talked. The names of those who would have been professional witnesses could easily have been found in the hospital report.

To the trial judge was committed the decision of the competency of Janson as a witness. The fact of his suicide attempt was before the jury to the extent of the prosecution's right to present it. The testimony of the psychiatrist who testified at the hearing for a new trial was not accepted by the trial judge. Janson testified at the May, 1953 hearing that he remembered his talk with the doctors when he entered Bellevue on the 21st of November. Janson was housed in a hotel in the custody of two policemen at all times between November 12th and November 21st. Of those who covered this assignment, one was on his vacation and three testified. Janson had no callers; his location then was a secret. After he had testified the officers took him to visit a minister once, to visit his wife once, to the hospital twice, at least once to a movie and once to a bowling alley where he kept score under the instructions of one. He chose the movie as recreation and rejected a suggestion of an additional movie, accepting the bowling alley as an alternative. He tapered off smoking on the 17th and stopped on the 18th, when he also ceased to converse with the officers. He ate less. On the 19th one officer told the district attorney of this change. It was on the evening of the 20th that the district attorney was told that on that day he was not eating at all and he arranged a meeting of Janson with the Police Psychiatrist on the next morning. There is nothing in this record to support the charges now made by defendant's present counsel of suppression or concealment of evidence. The whole record of this case shows that the conduct of the prosecutor's office throughout was fair and honorable. The defendant was accorded due process. We see no reason for a hearing.

Dated: New York, N. Y., Feb. 16, 1956.

JOHN W. CLANCY,
United States District Judge.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 381—October Term, 1955

(Argued June 5, 1956 Decided July 13, 1956)

Docket No. 24067

UNITED STATES ex rel. LEONARDO SALEMI,
Petitioner-Appellant,

—v.—

WILFRED L. DENNO, Warden of Sing Sing Prison,
Respondent-Appellee.

Before:

CLARK, *Chief Judge*, and
HINCKS and WATERMAN, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York, Clancy, *J.*, denying petitioner's application for a writ of habeas corpus. Affirmed.

OSMOND K. FRAENKEL, New York City, for petitioner-appellant.

FRANK S. HOGAN, District Attorney, New York County (Richard G. Denzer, Charles W. Manning, Assistant District Attorneys, of counsel), for respondent-appellee.

WATERMAN, *Circuit Judge*:

Petitioner, a state prisoner condemned to death, appeals from an order of the district court denying his application for a writ of habeas corpus. He claims that his confinement is in violation of the due process clause of the Fourteenth Amendment to the United States Constitution because his conviction rests on evidence which has since been discredited, and because New York has denied him the opportunity to present after-discovered evidence to a jury before sending him to his death. The facts are fully stated and discussed in the majority and dissenting opinions of the Court of Appeals of New York, 309 N. Y. 208, 128 N. E. 2d 377 (1955).

Petitioner's conviction for the murder of Walter Forlenza, who was fatally shot in a New York tavern in 1952, primarily rested on the testimony of two witnesses: (1) Janson, an eye-witness to the shooting, who identified petitioner as the killer; and (2) James Forlenza, brother of the victim, who testified that his brother had made a dying declaration to him in which he named petitioner as his assailant. After the close of the trial it developed that Janson had attempted suicide two days before he testified, had acted strangely while in police custody during the closing days of the trial, and had been removed to a mental hospital as "psychotic" on the day following the jury's verdict. With respect to Forlenza's testimony of a dying declaration, investigations by defense counsel, conducted long after the trial, discovered considerable evidence tending to show that Forlenza was not present in the hospital at the time the alleged declaration was made, and that the victim was physically incapable of talking at that time.

Petitioner contended in the New York courts that he should be given the opportunity of presenting this additional evidence at a new trial. Lengthy hearings were held on both issues, and conflicting evidence was presented by

the state and by the petitioner. Ultimately, both issues were resolved against petitioner, the New York court concluding that Janson was competent to testify at the time of trial, that the victim was not incapable of speech at the time the alleged dying declaration was made, and that it had not been established that Forlenza had not been in the hospital on the day the victim had died. A new trial was denied on the above grounds and also on the additional ground that the above evidence was not newly discovered within the meaning of the applicable New York statute, because petitioner was aware or should have been aware of this evidence at the time of trial by the exercise of due diligence. The Court of Appeals of New York affirmed by a 4-3 vote, holding that the trial judge had not abused his discretion in denying the motion for a new trial. 309 N. Y. 208, 128 N. E. 2d 377.

The district court denied petitioner's habeas corpus application on the basis of the record and without a hearing. The record indicates both the care with which the New York courts have scrutinized the factual issues presented by petitioner's motions for a new trial, and the reasonableness of their resolution by the state courts. Under the circumstances, it was proper for the district judge to accept the findings of fact of the state court. *Brown* v. *Allen*, 1953, 344 U. S. 443, 458, 497-508; see also the recent discussion of the precedents in *Cranor* v. *Gonzales*, 9 Cir. 1955, 226 F. 2d 83.

Petitioner does not seriously question here the judge made findings of fact of the New York court to the effect that Janson was competent to testify at the time of trial, and that Forlenza was competent to testify concerning the dying declaration. His contention is, rather, that a jury has never passed on the alleged "newly-discovered" evidence. He contends that this evidence, discovered since the trial, is highly favorable to him; and that it must be considered, before he can be put to death, not only by a judge, upon a motion for a new trial, but also—because it so seriously

affects the credibility of Janson and Forlenza and the weight to be given their testimony—by a jury. As he says in his brief, "there is the gravest doubt whether the testimony of either of them [Janson and Forlenza] would be accepted by a jury with knowledge of all the facts now in the record." Thus the gist of his claim of constitutional violation is that the denial of a new trial is a denial of due process.

However, we do not reach this important constitutional question because we think the district court properly denied petitioner's application for a writ of habeas corpus on an adequate state ground. Under New York law the grant of a new trial is governed by state statute. New York Code of Criminal Procedure § 465, subd. 7.[1] Protracted state court hearings determined that petitioner was not entitled to a new trial under that statute because he was aware or should have been aware of the alleged "newly discovered" evidence at the time of trial by the exercise of due diligence. This factual determination finds support in the record and is not unreasonable. Janson testified with his head bandaged

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1 "§ 465. In what cases granted

"The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases:

* * *

7. Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed."

and was cross-examined with respect to the cause of his injuries, prior mental stability, etc.; hospital records [available at the time of trial gave the names] of all the persons in attendance at and before the time of the victim's death; and there was considerable dispute at the trial concerning the time at which the alleged dying declaration was made to Forlenza. [The] Court of Appeals of New York gave a careful "reassessment" to the evidence presented at the hearings on the motions for a new trial, cf. *United States ex rel. Smith* v. *Baldi*, 1952, 344 U. S. 561, 573, and affirmed the denial of a new trial on an adequate state ground. [We do not think that New York violates the due process clause of the Fourteenth Amendment by requiring an accused to show due diligence before granting a new trial.]

Affirmed.

[On application for rehearing the foregoing opinion was modified by omitting the matter contained in brackets above and by inserting at the place of the first bracket the following:

> then available to defense counsel, in his possession, and introduced by him at the trial, gave information leading to the identification

and by inserting at the place of the second bracket the following:

> The evidence alleged to be "newly discovered" and its pertinence was comprehensively presented at the time of the hearing on the motion for a new trial, and the—]

The full text of the decision on rehearing follows:

Opinion on Rehearing

Decided August 16, 1956.

Per Curiam:

Appellant petitions for a rehearing. He alleges that we erred in our opinion of July 13, 1956 in that we did not properly treat certain of the contentions he had advanced.

We have re-examined and re-evaluated the record in the light of this petition, and adhere to our opinion that when the New York State courts denied appellant's motion for a new trial the denial in each instance was based on an adequate state ground; and that no constitutional issue is reached.

The last paragraph of our opinion of July 13 is amended to read:

> Janson testified with his head bandaged and was cross-examined with respect to the cause of his injuries, prior mental stability, etc.; hospital records then available to defense counsel, in his possession, and introduced by him at the trial, gave information leading to the identification of all of the persons in attendance at and before the time of the victim's death; and there was considerable dispute at the trial concerning the time at which the alleged dying declaration was made to Forlenza. The evidence alleged to be "newly discovered" and its pertinence was comprehensively presented at the time of the hearing on the motion for a new trial, and the Court of Appeals of New York gave a careful "reassessment" to this evidence so presented, cf. *United States ex rel. Smith* v. *Baldi,* 1952, 344 U. S. 561, 573, and affirmed the denial of a new trial on an adequate state ground.

With the opinion thus amended the petition for rehearing is denied.

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 106-300

UNITED STATES ex rel. LEONARDO SALEMI,

against

WILFRED L. DENNO, Warden Sing Sing Prison.

The petitioner, Leonardo Salemi, having appealed to the United States Circuit Court of Appeals for the Second Circuit, from the order entered in this cause on the 16th day of February, 1956, and said Court having filed its opinion dated the 13th day of July, 1956, wherein it was ordered, adjudged and decreed that such order be affirmed, it is

ORDERED, ADJUDGED AND DECREED that said judgment of the Circuit Court of Appeals for the Second Circuit be, and the same hereby is, made the judgment and order of this Court.

August 29th, 1956.

ARCHIE O. DAWSON,
United States District Judge.